



DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a conditional Buy America waiver is appropriate for the obligation of Federal-aid funds for 74 vehicle projects involving the purchase of approximately 3,500 vehicles (including sedans, vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors), including projects to retrofit vehicles with individual vehicle components, so long as they are assembled in the United States. The FHWA's Buy America requirements provide that 100 percent of all steel and iron that is permanently incorporated into a project must be domestically manufactured. With respect to vehicles, manufacturers typically assemble these products with many different components and subcomponents containing steel and iron. As a result, vehicles are typically referred to as being made where the final product rolls off the assembly line for delivery into the marketplace. The FHWA is unaware of any vehicle that is comprised of 100 percent domestically produced steel and iron, resulting in a need for a conditional Buy America waiver for these projects to proceed.

DATES: The effective date of the waiver is [insert date one day after publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202)

366-1562, or via e-mail at gerald.yakowenko@dot.gov. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366-4928, or via e-mail at michael.harkins@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

Background

The FHWA's Buy America regulations at 23 CFR 635.410 require a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's finding that a conditional Buy America waiver is appropriate for the obligation of Federal-aid funds for the purchase of 74 vehicle projects (including sedans, vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors).

In accordance with Division A, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112-284), the FHWA published a notice of intent to issue a waiver on its Web site for the 74 vehicle projects (including sedans,

vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors) (<http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=87>) on April 12th. The FHWA received 28 comments in response to the publication. Seventeen comments in support of the waiver were from clean air proponents or supporters of the FHWA's Congestion Mitigation Air Quality (CMAQ) Improvement Program. Seven commenters objected to the proposed waiver but did not provide substantive information regarding the availability of domestic alternates that meet the appropriate requirements. Two individuals commented on the need to further define domestic content. One individual commented on the need to define domestic assembly and one other individual provided comment on the applicability of the Federal Transit Administration's Buy America requirements for rolling stocks, which are not applicable to Federal-aid program.

Several commenters noted that FHWA has historically limited the application of Buy America requirements to products that are permanently incorporated into a Federal-aid highway construction project. These commenters questioned the applicability of the Buy America requirements to vehicle acquisitions and retrofit projects. In response to these commenters, the FHWA is implementing the statutory provisions of 23 U.S.C. 313(a) which preclude FHWA from obligating any funds ". . . unless steel, iron, and manufactured products used in such project are produced in the United States." The requirements are applicable to all Federal-aid projects funded under Title 23, United States Code including vehicle acquisitions and retrofit projects.

During the 15-day comment period, the FHWA conducted additional review but was unable to locate a domestic manufacturer that could meet a 100 percent domestic

steel and iron content requirement. Based on all the information available to the agency, the FHWA concludes that there are no domestic manufacturers that could meet a 100 percent domestic steel and iron content for the 74 vehicle projects (including sedans, vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors).

The FHWA's Buy America requirement was initially established in 1983 when the acquisition of vehicles was not eligible for assistance under the Federal-aid highway program. As such, the FHWA's Buy America requirements were tailored to the types of products that are typically used in highway construction, which generally meet a 100 percent domestic steel and iron content requirement. Vehicles were not the types of products that were initially envisioned as being purchased with Federal-aid highway funds when Buy America was first enacted. In today's global industry, vehicles are assembled with components that are made all over the world. The FHWA is not aware of any vehicle on the market that can claim to incorporate 100 percent domestic steel and iron content. For instance, the Chevy Volt, which was identified by many commenters in a November 21, 2011, Federal Register Notice (76 FR 72027) as being a car that is made in the United States, comprises only 40 percent United States and Canada content according to the window sticker (http://www.cheersandgears.com/uploads/1298005091/med_gallery_51_113_449569.png). There is no indication of how much of this 40 percent United States/Canadian content is United States-made content. However, it appears that there is an indication of whether vehicles are assembled in the United States. Specifically, the window sticker for the Chevy Volt says that the vehicle's final assembly point was in the United States.

While the manufacture of steel and iron products that are typically used in highway construction (such as pipe, rebar, struts, and beams) generally refers to the various processes that go into actually making the entire product, the manufacture of vehicles typically refers to where the vehicle is assembled. Thus, given the inherent differences in the type of products that are typically used in highway construction and vehicles, we feel that simply waiving the Buy America requirement, which is based on the domestic content of the product, without any regard to where the vehicle is assembled would diminish the purpose of the Buy America requirement. Moreover, in today's economic environment, the Buy America requirement is especially significant in that it will ensure that Federal Highway Trust Fund (HTF) dollars are used to support and create jobs in the United States.

One commenter believed that it was imperative that FHWA issue guidance clarifying how it intends to handle future vehicle waiver requests so that public agencies and companies can plan accordingly. Several commenters suggested that guidance be provided concerning the definition of final assembly and how this definition would be implemented for vehicle retrofit projects where vehicles manufactured outside the U.S. as gasoline or diesel vehicles are imported to the United States and then retrofitted or modified in the United States so that they can operate on alternative fuels. Another commenter suggested that FHWA issue a policy that defines the acceptable limit on domestic content.

In response to these comments, the FHWA does not believe that it is appropriate to establish a vehicle domestic content requirement threshold at the present time. The FHWA is uncertain whether such a condition would further the objectives of CMAQ

Program to encourage State and local entities to pursue clean fuel technologies.

Moreover, the FHWA has no data in order to determine what such a content standard should be. Also, the practicality of establishing such a limit for just the iron and steel components in a vehicle is questionable. The FHWA is unaware of any method by which the agency can use to determine where the steel and iron contained in the steel and iron components of a vehicle were manufactured. Similarly, the FHWA has no basis for defining the point of final assembly for vehicle retrofit projects other than the location where the retrofitting of the vehicle takes place prior to turning the vehicle over to the owner. As such, the FHWA is not prepared to address these issues as part of this particular waiver request.

As a result, State departments of transportation (DOT) will need to make a good faith effort to determine whether the final assembly of a vehicle or vehicle retrofit occurs in the United States. With respect to passenger motor vehicles, the FHWA notes that the National Highway Traffic Safety Administration has established criteria in 49 CFR Part 583 for vehicles subject to the America Automobile Labeling Act (AALA) ([http://www.nhtsa.gov/Laws+&+Regulations/Part+583+American+Automobile+Labeling+Act+\(AALA\)+Reports](http://www.nhtsa.gov/Laws+&+Regulations/Part+583+American+Automobile+Labeling+Act+(AALA)+Reports)). Vehicles meeting the criteria for final assembly under the AALA is one option for State DOTs to make a good faith effort in determining whether final assembly of vehicles subject to AALA requirements occurs in the United States. The FHWA will publish a notice in the Federal Register at a future date to request public comments on what standards should apply to vehicles. In the meantime, the FHWA does not wish to further delay these projects while the appropriate standard for vehicles is established.

While the FHWA has not located a vehicle that meets a 100 percent domestic iron and steel content requirement, the FHWA does not find that a complete waiver based on non-availability pursuant to 23 U.S.C. 313(b)(2) is appropriate. However, the FHWA also recognizes that at least a conditional waiver is necessary in order to permit the State DOTs to proceed with the projects. The FHWA believes that a conditional waiver that allows the public agencies to purchase vehicles so long as the final assembly of the vehicle as the end product occurs in the United States is appropriate. This approach is similar to the conditional waivers given to Alameda County, San Francisco County, and Merced County, CA, for vehicle purchases on November 21, 2011 (76 FR 72027 and 76 FR 72028) and March 30, 2012 (77 FR 19410).

In conclusion, and in light of the above, pursuant to 23 U.S.C. 313(b)(1), the FHWA finds that it is in the public interest to grant a conditional waiver from the general 100 percent domestic content requirement that applies to Federal-aid highway projects under Buy America. Under this conditional waiver, however, the final assembly of any vehicles purchased with HTF funds must occur in the United States. Thus, so long as the final assembly of the 74 vehicle projects (including sedans, vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors) occurs in the United States, applicants to this waiver request may proceed to purchase these vehicles and equipment consistent with the Buy America requirement.

In accordance with the provisions of section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a conditional waiver of Buy America requirements is appropriate. The FHWA invites public comment on this finding for an additional 15 days

following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to the waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

Issued on: June 6, 2013

Victor M. Mendez
Administrator
Federal Highway Administration

[FR Doc. 2013-14146 Filed 06/14/2013 at
8:45 am; Publication Date: 06/17/2013]